

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

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**E.I. DUPONT DE NEMOURS AND  
COMPANY,**

**Plaintiff,**

**v.**

**UNITED STATES OF AMERICA,**

**Defendant.**

**Civil Action No. 1:02CV177  
(Judge Keeley)**

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**UNITED STATES OF AMERICA**

**Plaintiff,**

**v.**

**E.I. DUPONT DE NEMOURS AND  
COMPANY,  
OLIN CORPORATION,  
ROCKWELL AUTOMATION, INC.,  
EPEC POLYMERS, INC. and  
GENERAL ELECTRIC COMPANY,**

**Defendants.**

**and**

**STATE OF WEST VIRGINIA, EX REL.,  
KEN ELLISON, DIRECTOR  
DIVISION OF LAND RESTORATION,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,**

**Plaintiff-Intervenor,**

**v.**

**Civil Action No. 1:03CV29  
(Consolidated with  
C.A. 1:02CV177)  
(Judge Keeley)**

E.I. DUPONT DE NEMOURS AND	:
COMPANY,	:
OLIN CORPORATION,	:
ROCKWELL AUTOMATION, INC.,	:
EPEC POLYMERS, INC.,	:
GENERAL ELECTRIC COMPANY, and	:
UNITED STATE OF AMERICA,	:
	:
Defendants.	:

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## CONSENT DECREE

### I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), has filed a complaint and an amended complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Ordnance Works Disposal Areas Superfund Site in Morgantown, Monongalia County, West Virginia ("the Site").

B. The State of West Virginia has also filed a complaint and an amended complaint seeking, *inter alia*, a declaratory judgment that the named defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607 for any future costs that the State may incur for response actions at the Ordnance Works Disposal Areas Superfund Site.

C. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. §9622(j)(1), EPA notified the United States Department of Interior and the National Oceanic and Atmospheric Administration on April 12, 2000, of negotiations with potentially responsible parties regarding

the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Decree.

D. Further, defendant E. I. du Pont de Nemours and Company ("DuPont") has also filed a complaint against the United States in this Court under Section 113(f) of CERCLA, 42 U.S.C. §9613(f), seeking contribution for costs it allegedly expended and may be required to expend in connection with the Site (the "DuPont Contribution Litigation," as further defined below).

E. DuPont and the Settling Defendants (as defined below) do not admit any liability to Plaintiffs or to any other party arising out of the transactions or occurrences alleged in the complaints or with respect to any issue addressed in this Consent Decree. Settling Federal Agencies (as defined below) do not admit any liability arising out of the transactions or occurrences alleged by DuPont and any of the Settling Defendants or any claim by the State.

F. The United States, the State of West Virginia, DuPont and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter (C.A. No. 1:03CV29) and the DuPont Contribution Litigation (C.A. No. 1:02CV177) will reduce litigation among the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

**THEREFORE**, with the consent of the Parties to this Decree, it is **ORDERED**,  
**ADJUDGED, AND DECREED:**

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1367, and 42 U.S.C. §§ 9607 and 9613(b), and also has personal jurisdiction over DuPont and Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaints, DuPont and Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. DuPont and Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States and the State, and upon DuPont and the Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of DuPont or Settling Defendants under this Consent Decree.

## **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation,

and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto.

In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Date of Lodging" shall mean the date this Consent Decree is lodged with the Court.

d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. "DuPont Contract Litigation" shall mean the lawsuit filed on March 2, 1999, in the United States Court of Federal Claims against the United States, No. 99-101C.

g. "DuPont Contribution Litigation" shall mean the lawsuit filed on November 26, 2002, in the United States District Court for the Northern District of West Virginia by DuPont against the United States, C.A. No. 1:02CV177.

h. "DuPont Past Response Costs" means the figure of \$695,236.00 plus an additional sum for Interest on that amount calculated from the Date of Lodging through the date of payment, which represents that portion of DuPont's claim in the DuPont Contract Litigation that covers consulting fees paid to Radian Corporation, Woodward and Clyde, ESI, Nihill and Riedley, and ICF Kaiser, including Interest from the dates DuPont demanded payment of these amounts in writing from the Settling Federal Agencies.

i. "Effective Date" shall mean the date of entry of this Consent Decree.

j. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

k. "EPA Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States (1) shall incur, after the Effective Date, in reviewing or developing plans, reports and other items required by the RD/RA Order; verifying the work required by the RD/RA Order; evaluating the continued protectiveness of the work required by the RD/RA Order (including, but not limited to, performance of such reviews as may be required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c)), and otherwise implementing, overseeing, or enforcing the RD/RA Order and this Consent Decree including, but not limited to, payroll costs, contractor costs, travel costs, and laboratory costs; and (2) has paid to conduct such activities between September 2, 2003 and the Effective Date.

The term "EPA Future Response Costs" shall also include all EPA Interim Response Costs and all Interest on all costs that Settling Defendants have agreed to reimburse under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from September 2, 2003, to the Effective Date.

l. "EPA Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Site between September 2, 2003 and the Effective date, and (b) incurred prior to the Effective Date, but paid after that date.

m. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

n. "EPA Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA, or DOJ on behalf of EPA, has paid at or in connection with the Site through September 2, 2003, and which costs are detailed in the cost summary package attached hereto as **Appendix A** of this Consent Decree.

o. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

p. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

q. "Parties" shall mean the United States (including EPA and the Settling Federal Agencies), the State of West Virginia, DuPont and Settling Defendants.

r. "Performing Defendants" shall mean Olin Corporation, Rockwell Automation, Inc., and EPEC Polymers, Inc.

s. "Performing Defendants' Future Response Costs" shall mean the necessary direct and indirect costs, including allocated overhead, of response consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (codified at 40 C.F.R. Part 300)("NCP" or "National Contingency Plan"), within the meaning of Section 107(a)(4)(B) of CERCLA, 42 U.S.C.

§ 9607(a)(4)(B), that Performing Defendants incur and pay for after April 8, 2005 to implement the RD/RA Order.

- t. "Plaintiffs" shall mean the United States and the State of West Virginia.
- u. "RD/RA Order" shall mean the Administrative Order for Remedial Design and Remedial Action: Operable Unit No. 1 (EPA Docket No. III-90-27-DC), including any amendments thereto.
- v. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.
- w. "Settling Defendants" shall mean Olin Corporation; Rockwell Automation, Inc.; EPEC Polymers, Inc.; and General Electric Company.
- x. "Settling Defendants' Past Response Costs" shall mean all costs incurred by Settling Defendants in performing the Work at the Site.
- y. "Settling Federal Agencies" shall mean the Department of the Defense, Department of Commerce, Department of the Treasury, Department of Labor and the General Services Administration, and any predecessor or successor departments, agencies or instrumentalities of the foregoing.
- z. "Settling Federal Agencies' Past Response Costs" shall mean all costs incurred by Settling Federal Agencies in participating in the financing of the Work at the Site.
- aa. "Site" shall mean the property commonly referred to by EPA as the Ordnance Works Disposal Areas Superfund Site, encompassing approximately 848 acres, located in Morgantown, Monongalia County, West Virginia, and generally shown on the map attached hereto as **Appendix B** of this Consent Decree.
- bb. "State" shall mean the State of West Virginia.
- cc. "State Future Response Costs" shall mean all costs, including, but not limited to,



direct and indirect costs, that the State shall incur from the Effective Date onward in reviewing or developing plans, reports and other items required by the RD/RA Order; verifying the work required by the RD/RA Order; evaluating the continued protectiveness of the work required by the RD/RA Order, and otherwise overseeing the RD/RA Order and this Consent Decree including, but not limited to, payroll costs, contractor costs, travel costs, and laboratory costs.

dd. "Trust Account" shall mean a trust account established at a Bank, entitled "the Ordnance Works Site Remedial Action Trust Account."

ee. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

ff. "Work" shall mean all work performed at the Site as of the Date of Lodging pursuant to the following administrative orders with EPA, including any amendments to such orders: the RD/RA Order as defined in this Section; the Administrative Order on Consent corresponding to EPA Docket No. III-90-16-DC; the Administrative Order on Consent corresponding to EPA Docket No. RCRA-III-033CA; the Administrative Order on Consent corresponding to EPA Docket No. III-96-68-DC; and the Administrative Order on Consent corresponding to EPA Docket No. III-97-110-DC.

## **V. PAYMENT OF PAST RESPONSE COSTS**

### **4. Payment of EPA Past Response Costs.**

The payments in the following two paragraphs (5 and 6) shall be made to EPA as reimbursement for the EPA Past Response Costs.

5. Settling Federal Agencies' Payment

Within 90 days following the Effective Date of this Consent Decree, the Settling Federal Agencies shall pay to EPA the sum of \$1,760,700.17, by causing that amount to be transferred from the Department of Treasury's Judgment Fund to the Hazardous Substances Superfund, via the Federal government's inter-agency electronic funds transfer system. In making such transfer, the following reference numbers shall be included: the U.S.A.O. file number 2002V00271, the EPA Region and Site/Spill Identification Number 03B5, the DOJ/ENRD/EES case number 90-11-2-369/2, the DOJ/ENRD/EDS case number 90-11-6-16932, and the civil action numbers 1:02CV177 & 1:03CV29 (N.D. WV)(consolidated cases), and notice of such payment shall be provided to the EPA officials identified in Section XIV. In the event that this payment is not made within 90 days following the Effective Date, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the Effective Date, and accruing through the date of the payment. Further, if the payment is not made within 90 days following the Effective Date, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the Effective Date, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with the letter agreement dated December 28, 1998 (attached hereto as "Appendix C").

6. Performing Defendants' Payment

Within 90 days of the Effective Date of this Consent Decree the Performing Defendants shall pay to EPA \$1,532,174.65, plus an additional sum for Interest on that amount

calculated from the Date of Lodging through the date of payment. All payments by Performing Defendants shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with EFT instructions provided to Performing Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the Northern District of West Virginia following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. At the time of payment, Performing Defendants shall also send notice that payment has been made to EPA and DOJ in accordance with Section XIV (Notices and Submissions). Such notice shall reference the U.S.A.O. file number 2002V00271 the EPA Region and Site/Spill Identification Number 03B5, the DOJ/ENRD/EES case number 90-11-2-369/2, and the civil action number 1:02CV177 & 1:03CV29 (N.D. WV.) (Consolidated Cases). The payment to be made pursuant to Paragraph 6 by Performing Defendants shall be deposited into the EPA Hazardous Substance Superfund.

7. Payment of Performing Defendants' Past Response Costs by Settling Federal Agencies

Within 60 days after the Effective Date of this Consent Decree, the Settling Federal Agencies, in settlement of claims against them and against DuPont, shall pay to the Trust Account the sum of \$2,420,082.80, plus interest calculated from April 8, 2005.

8. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agencies obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other

applicable provision of law.

9. Prior Payment by General Electric to Performing Defendants. General Electric Company has previously paid into the Trust Account the sum of \$270,000. In addition, General Electric Company hereby waives and releases any and all claims to amounts paid by General Electric Company pursuant to the Morgantown Ordnance Works Superfund Site Allocation Agreement, and stipulates and agrees that any and all funds remaining in the allocation account established thereby may be transferred to the Trust Account. General Electric Company's payment includes an amount for the Performing Defendants' past response costs incurred at or in connection with the Site, and projected EPA Future Response Costs, State Future Response Costs, and future response costs to be incurred by the Performing Defendants at or in connection with the Site, a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site will exceed the estimated total response costs upon which Settling Defendants' and Settling Federal Agencies' payments are based.

10. Use of Trust Account Funds. Funds deposited in the Trust Account pursuant to this Consent Decree shall be disbursed by the Trustee in payment for any aspect of the Work performed by the Performing Defendants, and/or EPA's Future Response Costs or State Future Response Costs, whether by direct payments from the Trust Account to contractors or the United States or the State, or by reimbursement to the Performing Defendants for payments made by them in excess of 46.53% of response costs related to Operable Unit One at the Site or 43.28% of response costs related to Operable Unit Two at the Site. Following the Effective Date of this Decree, the remaining balance in the Morgantown Site Allocation Process Trust Fund Account,

in the amount of approximately \$36,644.57, may be transferred to the Morgantown OU-1 Remedial Action Trust Account.

## **VI. PAYMENT OF FUTURE RESPONSE COSTS**

### **11. EPA Future Response Costs.**

#### **a. Payments by Settling Federal Agencies**

On behalf of themselves and DuPont, Settling Federal Agencies shall pay to EPA, in accordance with this paragraph, EPA Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis but no more frequently than semi-annually, EPA shall send Settling Federal Agencies and Performing Defendants a bill requiring payment that includes a cost summary, setting forth direct and indirect costs incurred by the United States and its contractors. Settling Federal Agencies shall pay 53.47% of the total amount of each such bill from EPA within sixty (60) days of Settling Federal Agencies' receipt of each bill, except that Settling Federal Agencies shall pay Future Response Costs disputed by Performing Defendants as provided in Paragraphs 13 and 14. If this payment is not made within sixty (60) days of receipt of the bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of the bill and accruing through the date of payment. Payment of EPA Future Response Costs shall be by transfer from the Department of Treasury's Judgment Fund to the Hazardous Substances Superfund, via the Federal government's inter-agency electronic funds transfer system. In making such transfer, the following reference numbers shall be included: the U.S.A.O. file number 2002V00271, the EPA Region and Site/Spill Identification Number 03B5, the

DOJ/ENRD/EES case number 90-11-2-369/2, the DOJ/ENRD/EDS case number 90-11-6-16932, and the civil action numbers 1:02CV177 & 1:03CV29 (N.D. WV)(consolidated cases), and notice of such payment shall be provided to the EPA officials identified in Section XIV of this Consent Decree. Further, if the Settling Federal Agencies' 53.47% share payment is not made within 90 days following the date the bill was issued, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the date the bill was issued, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with Appendix C. EPA bills disputed by the Performing Defendants shall be paid by the Settling Federal Agencies in accordance with Paragraphs 13 and 14.

b. Payments by Performing Defendants

Performing Defendants shall pay to EPA, in accordance with this paragraph, EPA Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis, but no more frequently than semi-annually, EPA shall send Performing Defendants and Settling Federal Agencies a bill requiring payment that includes a cost summary, setting forth direct and indirect costs incurred by the United States and its contractors. Performing Defendants shall pay 46.53% of the total amount of each such bill within sixty (60) days of Performing Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 13. If this payment is not made within sixty (60) days of receipt of the bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of the bill and accruing through the date of payment. Payment of EPA Future Response Costs shall be by electronic funds transfer in accordance with instructions provided by

EPA, or by certified or cashier's check. All certified or cashier's checks remitted to EPA by Performing Defendants pursuant to this Paragraph 11.b shall be made payable to "EPA Hazardous Substance Superfund" and shall reference EPA Region III and Site/Spill ID No. 03B5, DOJ case number 90-11-2-369/2, and the name and address of the party making payment. The Performing Defendants shall send the check(s) to United States Environmental Protection Agency, Region III, Attention: Superfund Accounting, P.O. Box 360515, Pittsburgh, PA 15251-6515, and shall send copies of the check(s) to the United States as specified in Section XIV (Notices and Submissions) and to the Docket Clerk (3RC00), United States Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103-2029. The total amount to be paid pursuant to this Paragraph 11.b to the United States shall be deposited in the EPA Hazardous Substance Superfund.

12. State Future Response Costs Performing Defendants and Settling Federal Agencies shall reimburse the State, as provided below, for all State Future Response Costs not inconsistent with the National Contingency Plan. The State will periodically send the Performing Defendants and the Settling Federal Agencies a bill requiring payment of State Future Response Costs that includes a cost summary, setting forth direct and indirect costs incurred by the State. The State Future Response Costs shall be documented by the following, as appropriate, or their equivalents: financial management system reports, invoices, time sheets and travel vouchers. The State shall provide the Performing Defendants and the Settling Federal Agencies with one copy of such supporting documentation, exclusive of any confidential business information and Privacy Act information at the time the bill is sent. The Performing Defendants and Settling Federal Agencies shall make all payments required by this Paragraph to the "West Virginia

Department of Environmental Protection.” Payment by Performing Defendants shall be by certified or cashier's check and shall be sent to:

Rhonda McGlothlin  
West Virginia Department of Environmental Protection,  
Division of Land Restoration  
Office of Environmental Remediation  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

Or, alternatively, by electronic funds transfer to:

West Virginia State Treasurer  
1900 Kanawha Boulevard East  
Charleston, WV 25305-0009  
Routing # 051904634  
Account# 03130014.

Performing Defendants shall pay the 46.53% total amount of the bill within thirty (30) days of Performing Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraphs 13 and 14. If this payment is not made within thirty (30) days of receipt of the bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of the bill and accruing through the date of payment. Settling Federal Agencies shall pay 53.47% of the total amount of each such bill from the State within sixty (60) days of Settling Federal Agencies' receipt of each bill requiring payment, except that Settling Federal Agencies shall pay Future Response Costs disputed by Performing Defendants as provided in Paragraphs 13 and 14.

13. Disputing EPA Future Response Costs and State Future Response Costs.

Performing Defendants may contest payment of any EPA Future Response Costs or State Future



Response Costs sought under Paragraph 11 or 12 if they determine that the United States or the State, as appropriate, has made an accounting error, or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and in accordance with the procedures set forth in this paragraph, and must be sent to the United States (including EPA and the Settling Federal Agencies) and/or the State, as appropriate, pursuant to Section XIV (Notices and Submissions). Any such objection shall specifically identify the contested EPA Future Response Costs or State Future Response Costs, and the basis for objection. In the event of an objection, the Performing Defendants, within the sixty (60) day period following receipt of the bill, and the Settling Federal Agencies within the sixty (60) day period following receipt of the bill, shall pay their respective percentage shares (53.47% for the Settling Federal Agencies, and 46.53% for the Performing Defendants) of the EPA Future Response Costs and/or the State Future Response Costs not contested by the Performing Defendants, in the manner described in Paragraph 11 and/or 12. Simultaneously, the Performing Defendants shall establish an interest-bearing escrow account in a federally-insured bank, duly chartered in the State of West Virginia and remit to that escrow account funds equivalent to their percentage share (46.53%) of the contested EPA Future Response Costs and/or State Future Response Costs. Performing Defendants shall send to the United States the EPA and/or the State, as provided in Section XIV (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested EPA Future Response Costs or State Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established, as well as a bank statement showing

the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Performing Defendants shall initiate the Dispute Resolution procedures in Section VII.

14. If the United States on behalf of EPA and/or the State prevails in the dispute, within five (5) days of the resolution of the dispute, Performing Defendants shall cause to be paid from the escrow account to EPA and/or the State, as appropriate, 46.53% of that portion of the costs (plus associated accrued interest) for which they did not prevail, in the manner described in Paragraph 11 or 12, and shall send a copy of such correspondence to the Settling Federal Agencies in accordance with Section XIV of this Decree. Further, following resolution of the dispute, EPA and/or the State, as appropriate, shall notify the Settling Federal Agencies in accordance with Section XIV of the amount that the Settling Federal Agencies owe (53.47% of the disputed costs, plus interest, for which the Performing Defendants did not prevail). The Settling Federal Agencies shall pay that amount within 60 days after receiving such notice from EPA or the State in the manner described in Paragraph 11 or 12. Performing Defendants shall be disbursed any balance of the escrow account.

The dispute resolution procedures set forth in Paragraph 13 in conjunction with the procedures set forth in Paragraphs 11 and 12 shall be the exclusive mechanisms for resolving disputes regarding the obligation of the Performing Defendants to reimburse the United States for EPA Future Response Costs and/or the State for State Future Response Costs. However, the procedures set forth in such Paragraphs shall not apply to actions by the United States to enforce obligations of the Performing Defendants that have not been disputed in accordance with Paragraph 13.

15. Performing Defendants' Future Response Costs. Settling Federal Agencies shall pay to Performing Defendants, in accordance with this Paragraph 15, 53.47% of Performing Defendants' Future Response Costs.

a. Reimbursement of Response Costs

(i) Performing Defendants may periodically submit to the Settling Federal Agencies a Complete Invoice, as defined in Paragraph 15.a.ii. below, for 53.47% of Future Response Costs paid by Performing Defendants up to the date of that invoice. Unless the Settling Federal Agencies disputes this invoice pursuant to the dispute resolution provisions in paragraph 15.b. below, the Settling Federal Agencies shall pay the full amount of the Complete Invoice within 90 days of receiving it. The payment by the Settling Federal Agencies shall be made to the Performing Defendants by electronic transfer pursuant to instructions which Performing Defendants shall provide to the Settling Federal Agencies.

(ii) A Complete Invoice shall consist of: (1) a certification under penalty of perjury by a responsible officer or official of Performing Defendants stating:

"On behalf of Olin Corporation, Rockwell Automation, Inc., EPEC Polymers, Inc., and the Ordnance Works Site Remedial Action Trust, I hereby certify that (a) all of the costs referenced in the attached Complete Invoice are Performing Defendants' Future Response Costs as defined in Paragraph 3.s of the Consent Decree in Civil Action No. 1:02CV177 (and consolidated cases) in the United States District Court for the Northern District of West Virginia ("Consent Decree"), (b) all of those costs have been paid in full, and (c) the costs are properly invoiced in accordance with Paragraph 15 of the Consent Decree. Payment by the United States of 53.47% of the invoiced amount in the attached Complete Invoice, together with any interest accrued on that amount, shall be accepted by Olin Corporation, Rockwell Automation, Inc., EPEC Polymers, Inc., and the Ordnance Works Site Remedial Action Trust as payment in full of all sums owing under the attached Complete Invoice."

(2) a description of the work performed and the costs incurred, along with such documentation

as may be necessary, to enable the Settling Federal Agencies to determine that the costs are Response Costs; and (3) adequate proof of payment of all of the Response Costs included in the Complete Invoice. If Olin Corporation personnel have performed work constituting Performing Defendants' Future Response Costs, such costs shall be documented by a statement identifying the personnel performing the work, their chargeable hourly rate (reflecting the cost to Olin Corporation) and allocated overhead, the date and number of hours worked, and a description of the work performed.

(iii) Complete Invoices for Performing Defendants' Future Response Costs shall be submitted to the Settling Federal Agencies no more frequently than semi-annually, except that any Complete Invoice for Response Costs that exceeds \$100,000 may, at Performing Defendants' election, be submitted to the Settling Federal Agencies immediately upon payment by Performing Defendants of all of the costs in the Complete Invoice. Performing Defendants shall submit Response Costs paid after the Effective Date in a Complete Invoice within three years after the date on which they were paid. The Settling Federal Agencies have the right to refuse payment of such Response Costs that have not been submitted to them in a Complete Invoice within three years of the date on which they were paid.

b. Resolution of Disputes

(i) If the Settling Federal Agencies object to paying a Complete Invoice or a portion thereof, they shall provide written notice to Performing Defendants of their objection(s) within 45 days of the date the Complete Invoice is received. If the Settling Federal Agencies object to only a portion of a Complete Invoice, they shall pay 53.47% of the undisputed portion of the Complete Invoice within 90 days of the date the Complete Invoice is received.

(ii) The Settling Federal Agencies may object to a Complete Invoice or a portion thereof on the following grounds: (1) costs included in a Complete Invoice are not Performing Defendants' Future Response Costs as defined in this Consent Decree; (2) the description of the work performed or the costs incurred, and any accompanying documentation submitted to the Settling Federal Agencies, is insufficient to enable them to determine that the costs are Response Costs; (3) there is inadequate proof of payment of the Response Costs included in the Complete Invoice; or (4) the certification is false, incorrect, incomplete, or absent. The Settling Federal Agencies shall specify with particularity their reason(s) for objecting to a Complete Invoice or portion thereof.

(iii) Within 30 days after the Settling Federal Agencies submits an objection to a Complete Invoice, the Settling Federal Agencies and Performing Defendants shall meet and confer in good faith in an effort to resolve the dispute informally. In the event that they are unable to mutually resolve a dispute, they agree to promptly submit the dispute to a nonbinding alternative dispute resolution process, such as mediation, a settlement conference, or a neutral environmental professional. Unless otherwise agreed to by the Performing Defendants and the Settling Federal Agencies, such a nonbinding alternative dispute resolution process shall take place promptly in Washington, DC. Each party shall pay its own costs for the nonbinding alternative dispute resolution process and shall share equally the costs of the mediator, the person or entity conducting the settlement conference, or the neutral environmental professional.

(iv) If the dispute is not fully resolved within 90 days after the Settling Federal Agencies submit an objection to a Complete Invoice, either side may request that the Court resolve the dispute. The Performing Defendants and the Settling Federal Agencies hereby

consent to the reference of a dispute under this paragraph to a United States Magistrate Judge and agree to cooperate and use their best efforts to enable the Court to resolve the dispute as reasonably promptly as the Court's calendar permits. If a dispute is referred to a United States Magistrate Judge, the District Court may reconsider the Magistrate Judge's decision where it has been shown that the Magistrate Judge's order is clearly erroneous or contrary to law, within the meaning of 28 U.S.C. § 636(b)(1)(A).

c. Interest

If payment of a Complete Invoice by the Settling Federal Agencies is not made in full within 30 days after they receive the Complete Invoice, interest on the unpaid balance shall accrue commencing on the 31st day after the Complete Invoice was received. Interest shall accrue at the rate specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 of the United States Code. If the Settling Federal Agencies object to all or any portion of a Complete Invoice pursuant to Paragraph 15.b. above, interest shall still be payable pursuant to this paragraph on any portion of such Complete Invoice paid by the Settling Federal Agencies after 30 days after they receive the Complete Invoice.

d. Independent Contractors

It is understood and agreed that Performing Defendants, or any person or entity arranging, performing, or contracting for environmental response work at the Site, shall act as an independent contractor and not as an agent or employee of the United States in arranging, performing, or contracting for the work.

## **VII. DISPUTE RESOLUTION**

### **Disputes Between Settling Defendants and/or DuPont and EPA**

16. Any dispute which arises under this Consent Decree between Settling Defendants and/or DuPont and EPA shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

(a) In the event that the parties cannot resolve a dispute by informal negotiations under this paragraph, then the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, the Parties in dispute with EPA ("Disputing Parties") invoke the formal dispute resolution procedures of this Paragraph 16 by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Disputing Parties. The Statement of Position shall specify the Disputing Parties' position as to whether formal dispute resolution should proceed under Paragraph 16(d) ("Record Review Disputes") or Paragraph 16(e) ("Non-record Review Disputes").

(b) Within fourteen (14) days after receipt of the Disputing Parties' Statement of Position, EPA will serve on the Disputing Parties its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all

supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 16(d) or Paragraph 16(e). Within seven (7) days after receipt of EPA's Statement of Position, the Disputing Parties may submit a Reply.

(c) If there is disagreement between EPA and the Disputing Parties as to whether dispute resolution should proceed under Paragraph 16(d) or Paragraph 16(e), the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if the Disputing Parties ultimately appeal to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 16(d) and 16(e).

(d) Record Review Disputes. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph 16(d). For purposes of Paragraph 16(d) the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under the RD/RA Order; and (2) the adequacy of the performance of response actions taken pursuant to the RD/RA Order. Nothing in this Consent Decree shall be construed to allow any dispute by the Disputing Parties regarding the validity of the RD/RA Order, including any of its attachments or appendices.

1. An administrative record of the dispute shall be maintained by EPA and



shall contain all statements of position, including supporting documentation, submitted pursuant to Paragraph 16. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

2. The Director of the Hazardous Site Cleanup Division, EPA Region III, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 16(d)(1). This decision shall be binding upon the Disputing Parties, subject only to the right to seek judicial review pursuant to Paragraph 16(d)(3).

3. Any administrative decision made by EPA pursuant to Paragraph 16(d)(2) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Disputing Parties with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to the motion.

4. In proceedings on any dispute governed by this Paragraph 16(d), the Disputing Parties shall have the burden of demonstrating that the decision of the Director of the Hazardous Site Cleanup Division, EPA Region III, is arbitrary and capricious or otherwise not in accordance with law. Judicial

review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 16(d)(1).

(e) Non-record Review Disputes Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph 16(e).

1. Following receipt of Disputing Parties' Statement of Position submitted pursuant to Paragraph 16(a), the Director of the Hazardous Site Cleanup Division, EPA Region III, will issue a final decision resolving the dispute. The Director's decision shall be binding on the Disputing Parties unless, within ten (10) days of receipt of the decision, the Disputing Parties file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to the Disputing Parties' motion.

2. Judicial review of any dispute governed by this Paragraph 16(e) shall be governed by applicable principles of law.

(f) The invocation of formal dispute resolution procedures under Paragraph 16 shall not extend, postpone, or affect in any way any obligation of the Disputing Parties under this Consent Decree, not directly in this dispute, unless EPA or the Court agrees otherwise.

Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 16. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Disputing Parties do not prevail on the disputed issue, stipulated penalties may be demanded in accordance with Paragraph 19.

Disputes Between Settling Defendants and/or Settling Federal Agencies and the State

17. Any dispute which arises under this Consent Decree between the Settling Defendants and/or the Settling Federal Agencies and the State shall in the first instance be the subject of informal negotiations between the Secretary of the West Virginia Division of Environmental Protection (or his or her delegatee or representative) and the Parties in dispute with the State (the "Disputing Parties"). Any party to this Consent Decree shall inform the party subject to the dispute by submitting written notice of the dispute in accordance with Section XIV of this Consent Decree. The informal negotiation period shall be twenty (20) days from receipt of the written notice of dispute, unless it is modified by written agreement of the parties. If after the informal negotiation period the matter is still not resolved, then the State and the Disputing Parties agree that an independent mediator will be agreed upon and a mediation will be held within a second twenty (20) day period with each party splitting the costs of the mediation. If the mediation is unsuccessful, then the State and the Disputing Parties hereby agree that either party may seek appropriate relief from this Court.

## **VIII. FAILURE TO COMPLY WITH CONSENT DECREE**

18. Interest on Late Payments. If the Performing Defendants or the Settling Federal Agencies fail to make any payment to EPA or the State under Section V or Section VI by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment, as explained more fully in those Sections.

19. Stipulated Penalty.

a. If any amounts due from the Performing Defendants under Section V are not paid to EPA by the required date, Performing Defendants shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 18, \$ 1,500 per violation per day that such payment is late. If any amounts due under Section VI are not paid to EPA or the State, as appropriate by the required date, Performing Defendants shall be in violation of this Consent Decree and shall pay to EPA, and/or the State, as appropriate, as a stipulated penalty, in addition to the Interest required by Paragraph 18, \$ 1,500 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA or the State. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by electronic funds transfer in accordance with instructions provided by EPA, or certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party(ies) making payment, the Site name, the EPA Region and Site Spill ID Number 03B5, DOJ Case

Number 90-11-2-369/2, and the civil action number. The check (and any accompanying letter) shall be sent to:

United States Environmental Protection Agency, Region III  
Attention: Superfund Accounting  
P.O. Box 360515  
Pittsburgh, PA 15251-6515

All payments of stipulated penalties to the State shall be made by certified or cashier's check made payable to "West Virginia Department of Environmental Protection" and shall be sent to:

c/o Ms. Rhonda McGlothlin  
West Virginia Department of Environmental Protection  
Division of Land Restoration  
Office of Environmental Remediation  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304;

Or, alternatively, by electronic funds transfer to:

West Virginia State Treasurer  
1900 Kanawha Boulevard East  
Charleston, WV 25305-0009  
Routing # 051904634  
Account# 03130014.

c. At the time of each payment to EPA, the paying parties shall also send notice that payment has been made to EPA and DOJ in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number 03B5, DOJ Case Number 90-11-2-369/2, and the civil action number. At the time of each payment to the State, the paying parties shall also send notice that payment has been made to the State of West Virginia in accordance with Section XIV (Notices and

Submissions); such notice shall indicate that the payment is for stipulated penalties, shall reference the name and address of the party making payment, the case name, and the civil action number.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA or the State has notified Performing Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due, and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

20. If the United States brings an action to enforce any provision of this Consent Decree against Settling Defendants or DuPont, the Party(ies) sued shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time. If the State brings an action to enforce any provision of this Consent Decree against Settling Defendants, DuPont, or the Settling Federal Agencies, the Party(ies) sued shall reimburse the State for all costs of such action, including but not limited to costs of attorney time.

21. Payments made under this Section to the United States on behalf of EPA shall be in addition to any other remedies or sanctions available to the United States by virtue of Settling Defendants' or DuPont's failure to comply with the requirements of this Consent Decree. Payments made under this Section to the State of West Virginia shall be in addition to any other remedies or sanctions available to the State by virtue of Settling Defendants', Settling Federal Agencies' or DuPont's failure to comply with the requirements of this Consent Decree.

22. Joint and Several Liability. The obligations of Performing Defendants to pay

amounts owed the United States and/or the State under Section V and Section VI of this Consent Decree are joint and several. In the event of the failure of any one or more Performing Defendants to make the payments required under Sections V and/or Section VI of this Consent Decree, the remaining Performing Defendants shall be responsible for such payments.

23. Notwithstanding any other provision of this Section, the United States and the State may, in their unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Performing Defendants from payment as required by Section V or Section VI of this Consent Decree, or excuse any of the Parties from performance of any other requirements of this Consent Decree.

#### **IX. COVENANTS BY PLAINTIFFS**

24. United States' Covenant Not to Sue Settling Defendants and DuPont.

a. Except as specifically provided in Section X (Reservation of Rights by United States and the State), the United States covenants not to sue or to take administrative action against DuPont or Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover EPA Past Response Costs and Settling Federal Agencies' Past Response Costs. For DuPont, this covenant not to sue shall take effect upon the Effective Date of this Consent Decree. For Settling Defendants, this covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 6, and any amounts due under Section VIII (Failure to Comply with Consent Decree) in connection with such payments. For Settling Defendants and DuPont, this covenant not to sue is

conditioned upon the satisfactory performance by them of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and DuPont, and does not extend to any other person.

b. Except as specifically provided in Section X (Reservation of Rights by United States and the State), the United States covenants not to sue or to take administrative action against DuPont and Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover EPA Future Response Costs. For DuPont, this covenant not to sue shall take effect upon the Effective Date of the Consent Decree. For Settling Defendants, this covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 6 , and any amount due under Section VIII (Failure to Comply with Consent Decree) in connection with such payments. For Performing Defendants, this covenant not to sue is conditioned upon the satisfactory performance by them of their obligations under this Consent Decree. This covenant not to sue extends only to DuPont and Settling Defendants, and does not extend to any other person.

25. EPA Covenant for Settling Federal Agencies. Except as specifically provided in Section X (Reservation of Rights by United States and the State), EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover EPA Past Response Costs and EPA Future Response Costs. This covenant shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 5 . This covenant is conditioned upon the satisfactory performance by the Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to the Settling Federal Agencies and not to any other persons.



26. State's Covenant Not to Sue DuPont, Settling Defendants and the Settling Federal Agencies

Except as provided in Section X (Reservation of Rights by United States and State), the State covenants not to sue or take administrative action against DuPont, Settling Defendants or the Settling Federal Agencies pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), or under the West Virginia Hazardous Waste Emergency Response Fund Act (W.Va. Code §§ 22-19-1 to -6), to recover Past or Future Response Costs of the State. For purposes of this paragraph Past Response costs of the State shall mean all costs paid by the State at or in connection with the Site through the date of entry of this Consent Decree. For DuPont, this covenant not to sue shall take effect upon the Effective Date of the Consent Decree. For Settling Defendants and Settling Federal Agencies, this covenant not to sue shall take effect upon payment by the Performing Defendants and/or the Settling Federal Agencies of the amounts required by Section V, and shall be conditioned upon Settling Defendants' or the Settling Federal Agencies' continuing obligation to pay amounts required by Section VI, and otherwise, upon satisfactory performance of their other obligations under this Consent Decree. This covenant not to sue extends only to DuPont, Settling Defendants and the Settling Federal Agencies.

**X. RESERVATIONS OF RIGHTS BY UNITED STATES AND THE STATE**

27. Reservations by the United States. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants, DuPont and Settling Federal Agencies with respect to all matters not expressly included within the Covenants contained in Paragraphs 24 and 25. Notwithstanding any other provision of this Consent

Decree, the United States reserves all rights against Settling Defendants and DuPont, and EPA and the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies, with respect to:

- a. liability for failure of Settling Defendants, DuPont or Settling Federal Agencies to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of EPA Past Response Costs or EPA Future Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and
- f. liability for damages as a result of a failure of Performing Defendants Olin Corp. and Rockwell Automation, Inc., or their predecessors to comply with the RD/RA Order including, but not limited to, liability for such damages as may be awarded pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3) .

28. Reservations by the State. The State's covenant not to sue set forth in Paragraph 26, does not pertain to any matters other than those expressly specified therein. Notwithstanding any other provision of this Consent Decree, the State of West Virginia reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants, DuPont and the Settling Federal Agencies with respect to all other matters, including but not limited to:

- a. liability for failure of Settling Defendants and DuPont to meet a

requirement of this Consent Decree;

- b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- c. criminal liability;
- d. liability for injunctive relief or administrative order enforcement under State law; and State costs associated with Federal enforcement of Section 106 of CERCLA, 42 U.S.C. § 9606; and
- e. liability for costs incurred or to be incurred by the State that are not within the definition of State Future Response Costs.

#### **XI. COVENANTS BY SETTLING DEFENDANTS, DUPONT AND SETTLING FEDERAL AGENCIES**

29. The following covenants are provided by the Settling Defendants, DuPont and the Settling Federal Agencies:

a. Covenants by Settling Defendants and DuPont

Settling Defendants and DuPont covenant not to sue and agree not to assert any claims or causes of action against the United States or the State, or their contractors or employees, with respect to all EPA Past Response Costs, EPA Future Response Costs, State Future Response Costs, Settling Defendants' Past Response Costs, Settling Federal Agencies' Past and Future Response Costs, DuPont's Past Costs and this Consent Decree, including but not limited to:

- 1. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42

U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

2. any claim arising out of the response actions at the Site for which EPA Past Response Costs, EPA Future Response Costs, State Future Response Costs, Settling Defendants' Past Response Costs, Settling Federal Agencies' Past and Future Response Costs, and/or DuPont's Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of West Virginia, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

3. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613.

For DuPont, this covenant not to sue shall take effect upon the Effective Date of this Consent Decree. For Settling Defendants, this covenant not to sue shall take effect upon receipt by the Performing Defendants of all payments required by Section V, Paragraph 7 of this Consent Decree, except that the covenant regarding claims identified in subparagraph (a)(1) above, shall take effect upon the Effective Date of this Consent Decree. The Performing Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States on account of the failure by Settling Federal Agencies to comply with their obligations under Paragraph 15 of this Consent Decree.

b. Covenant by Settling Federal Agencies.

Settling Federal Agencies hereby agree not to assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the Work and any of EPA's Past

or Future Response Costs, the State's Future Response Costs, DuPont's Past Response Costs and/or the Settling Defendants' Past or Future Response Costs as defined herein, or this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).

30. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

## **XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

31. [Reserved]

32. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

33. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants, DuPont, and the United States are entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are as follows:

- a. all EPA Past Response Costs;
- b. all EPA Future Response Costs and all State Future Response Costs;
- c. all Settling Defendants' Past Response Costs;
- d. all Performing Defendants' Future Response Costs;
- e. all DuPont Past Response Costs;
- f. all Settling Federal Agencies' Past Response Costs; and
- g. the Work.

34. DuPont and each Settling Defendant agree that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree it will notify EPA, DOJ and the State in writing no later than 60 days prior to the initiation of such suit or claim. DuPont and each Settling Defendant also agree that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA, DOJ and the State in writing within 10 days of service of the complaint or claim upon it. In addition, DuPont and each Settling Defendant shall notify EPA, DOJ and the State within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

35. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other relief relating to the Site, neither Settling Defendants nor DuPont shall assert, nor shall they maintain any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant

case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiffs set forth in Section IX.

### **XIII. RETENTION OF RECORDS**

36. Until 10 years after the Effective Date of this Consent Decree, DuPont and each Settling Defendant shall preserve and retain all records, reports, or information (hereinafter referred to as “records”) now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

37. After the conclusion of the 10-year document retention period in the preceding paragraph, DuPont and Settling Defendants shall notify EPA, DOJ and the State at least 90 days prior to the destruction of any such records, and, upon request by EPA, DOJ or the State, Du Pont and Settling Defendants shall deliver any such records to EPA or the State. DuPont and Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If DuPont and/or Settling Defendants assert such a privilege, DuPont and/or Settling Defendants, as appropriate, shall provide Plaintiffs with the following: (1) the title of the record; (2) the date of the record; (3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; (4) the name and title of each addressee and recipient; (5) a description of the subject of the record; and (6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiffs in redacted form to mask the privileged information only. DuPont and

Settling Defendants shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the favor of DuPont and/or the Settling Defendants. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

38. DuPont and each Settling Defendant hereby certify individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972. The United States acknowledges that the Settling Federal Agencies (1) are subject to all applicable Federal record retention laws, regulations, and policies; and (2) have fully complied with any and all EPA and State requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

#### **XIV. NOTICES AND SUBMISSIONS**

39. Except as specifically provided elsewhere in this Consent Decree, whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in



writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, the Settling Federal Agencies, the State, DuPont and Settling Defendants, respectively.

**As to the United States:**

1. Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
Re: DOJ # 90-11-2-369/2
2. Chief, Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Re: DOJ # 90-11-3-368

**As to EPA:**

3. Andrew S. Goldman (3RC41)  
Senior Assistant Regional Counsel  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-2487 (phone)  
(215) 814-2603 (fax)
4. Barbara Borden (3PM30)  
EPA Project Coordinator  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029  
(215) 814-5162 (phone)  
(215) 814- 5232 (fax)

**As to Settling Federal Agencies:**

5. U.S. Army Corps of Engineers  
Project Manager  
Attn: CENWO-PM-H (Linda White)  
106 South 15th Street  
Omaha, Nebraska 68102-1618  
(402) 221-7672 (phone)  
(402) 221-7796 (fax)

**As to the State:**

6. Mark J. Rudolph, Esquire  
Senior Counsel  
Office of Legal Services  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304  
(304) 926-0460 (phone)  
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7. Mark Slusarski, State Project Coordinator  
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West Virginia Department of Environmental Protection  
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**As to the Settling Defendants:**

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Olin Corporation  
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Kimberly Lesniak

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**As to DuPont:**

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Corporate Counsel  
E.I. du Pont de Nemours and Company  
1000 Market Street  
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John McGahren  
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(973) 639-7298 (fax)

**XV. RETENTION OF JURISDICTION**

40. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

## **XVI. INTEGRATION/APPENDICES**

41. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

**“Appendix A”** is the Cost Report for the Ordnance Works Site (2/12/04)).

**“Appendix B”** is a map generally depicting the Site.

**“Appendix C”** is the Letter of Lois J. Schiffer, Assistant Attorney General, U.S. DOJ to Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, dated December 28, 1998.

## **XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

42. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. DuPont and Settling Defendants consent to the entry of this Consent Decree without further notice.

43. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

### **XVIII. SIGNATORIES/SERVICE**

44. Each undersigned representative of a Settling Defendant to this Consent Decree, DuPont and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice and the Secretary, West Virginia Department of Environmental Protection certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

45. Each Settling Defendant and DuPont hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

46. Each Settling Defendant and DuPont shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants and DuPont hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. As to those Settling Defendants against whom the United States has not previously filed an action in this matter, the Parties agree that such Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

### **XIX. FINAL JUDGMENT**

47. Upon approval and entry of this Consent Decree by the Court, this Consent Decree

shall constitute the final judgment between and among the United States, the State, DuPont and the Settling Defendants in C.A. No. 1:03CV29, and the consolidated case C.A. No. 1:02CV177 (the DuPont Contribution Litigation). The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

**SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2005.**

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HONORABLE IRENE M. KEELEY  
Chief Judge, United States District Court  
Northern District of West Virginia

***THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Olin Corporation, et al., relating to the Ordnance Works Disposal Areas Superfund Site.***

**FOR THE UNITED STATES OF AMERICA:**

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W. BENJAMIN FISHEROW  
Deputy Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

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LISA A. CHERUP  
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KENT HANSON  
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Washington, D.C. 20026

THOMAS E. JOHNSTON  
United States Attorney  
Northern District of West Virginia

By: \_\_\_\_\_

PATRICK FLATLEY  
Assistant United States Attorney  
Northern District of West Virginia  
U.S. Department of Justice  
Home Building, Suite 200  
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\_\_\_\_\_  
DONALD R. WELSH  
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\_\_\_\_\_  
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\_\_\_\_\_  
ANDREW S. GOLDMAN  
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**FOR THE STATE OF WEST VIRGINIA:**

---

STEPHANIE R. TIMMERMEYER  
Secretary  
Department of Environmental Protection  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

---

MARK J. RUDOLPH  
Senior Counsel  
Department of Environmental Protection  
601 57<sup>th</sup> Street, S.E.  
Charleston, WV 25304

**FOR E.I. DUPONT DE NEMOURS AND COMPANY**

*Signature*

V 18/4/05

***Please Type the Following:***

Name: Bernard Reilly

Title: Corporate Counsel

Address: DuPont Company  
1007 Market Street  
Wilmington, DE 19898

**Agent Authorized to Accept Service on Behalf of Above-Signed Party:**

***Please Type the Following:***

Name: John McGahren

Title: Partner

Address: Latham & Watkins, One Newark Center, 16th Floor, Newark, New Jersey 07101-3174

Telephone: \_\_\_\_\_



**FOR OLIN CORPORATION:**

*Signature* \_\_\_\_\_

*Please Type the Following:*

Name: Curt M Richards

Title: Vice President, Environment, Health & Safety

Address: P. O. Box 248  
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**Agent Authorized to Accept Service on Behalf of Above-Signed Party:**

*Please Type the Following:*

Name: George H Pain

Title: Vice President, General Counsel & Secretary

Address: Olin Corporation  
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**FOR ROCKWELL AUTOMATION, INC.:**

*Signature* \_\_\_\_\_

*Please Type the Following:*

Name: GARY BALLESTEROS

Title: ASSOCIATE GENERAL COUNSEL

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**Agent Authorized to Accept Service on Behalf of Above-Signed Party:**

*Please Type the Following:*

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

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**FOR GENERAL ELECTRIC COMPANY:**

**Signature**

7

***Please Type the Following:***

Name: W. Scott Seeley

**Title:** General Counsel -- GE Infrastructure

Address: 187 Danbury Road, Wilton CT 06897

**Agent Authorized to Accept Service on Behalf of Above-Signed Party:**

***Please Type the Following:***

Name: Mark R. Mazanec

**Title:** Attorney

**Address:** Baker & Hostetler LLP 1900 East 9th Street  
3200 National City Center Cleveland OH 44114-3485

Address: 3200 National City Center Cleveland OH 44114-3485

**Telephone:** \_\_\_\_\_